

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.07.2019
Pronounced on : 19.08.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Crl.A.Nos.321 & 861 of 2018

1.Nirmal Sarkar

... Appellant/A1 in Crl.A.No.321 of 2018

2.Anima Depnath

... Appellant/A2 in Crl.A.No.861 of 2018

-Vs-

State represented by,
The Inspector of Police,
Redhills Police Station,
Tiruvallur District
Cr.No.1901 of 2015.

... Respondent in Crl.A.No.321 of 2018

State represented by,
The Inspector of Police,
Redhills Police Station,
Chennai.
Cr.No.1901 of 2015.

... Respondent in Crl.A.No.861 of 2018

COMMON PRAYER : Criminal Appeals filed under Section 374 (2) of Code of Criminal Procedure, to set aside the conviction and sentence passed by the learned IV Additional Sessions Judge, Ponneri, Tiruvallur District in S.C.No.184 of 2016 dated 04.01.2018.

In Both Crl.As

For Appellants : Mr.C.R.Malarvannan for
Mr.V.Rajamohan

For Respondent : Mr.R.Prathap Kumar
Additional Public Prosecutor

COMMON JUDGMENT

[Judgment of the Court was made by M.NIRMAL KUMAR, J.]

These Criminal Appeals arise out of the conviction and sentence passed by the learned IV Additional Sessions Judge, Ponneri in S.C.No.184 of 2016 dated 04.01.2018. The appellants were charged for the offence under Sections 302 r/w 34 of IPC. The trial Court on completion of trial found the appellants guilty for offence under Section 302 r/w 34 of IPC, convicted and sentenced them to undergo life imprisonment each and to pay a fine of Rs.1.000/- each in default to undergo three months Simple imprisonment.

2.The case of the prosecution is that A1 is the friend of the deceased. The deceased and A2 are husband and wife, they have a female child Arpitha Debnath/PW8. The appellants and the deceased hail from the State of Tripura. A1 often used to visit the house of the deceased and in course of it, illicit relationship developed between the wife of the deceased/A2 and A1. Further, A2 left the company of the deceased and her daughter, came down to Chennai along with A1. Both the accused were living together as husband and wife at Gangaammal Kovil Street, Pallikuppam, Palavoyal, Redhills. The deceased had called upon A2, ascertained her location and came to Chennai on 18.12.2015 along with his daughter PW8. Thereafter, the deceased, PW8 and the appellants lived together in the said address. On 20.12.2015 there was a quarrel between the deceased and A2 with regard to the washing the clothes of the deceased. On the same day, the deceased and A1 went to the market to purchase vegetables and chicken. After purchasing the things there was a wordy quarrel between them, PW10 compromised them. On the day itself at about 10.00 p.m, the appellants has beaten the deceased on his head with a wooden log [MO5] and caused the death of the deceased. At that time hearing the noise, PW8 woke up from the bed, A2 shuttered her mouth and turned off the light and asked her to go to sleep. Thereafter, the accused put the body of the deceased in a gunny bag and disposed it in the half constructed building. Thereafter, the accused/A1 and A2 along with PW8 had returned back to their native Tripura. After some time foul smell emanated from the gunny bag. The nearby residents informed PW2/the Village Assistant. PW2 and PW1/VAO visited the scene, opened the gunny bag and found the decomposed body of the deceased. PW1 lodged a complaint [Ex.P1] on 31.12.2015 to the Inspector of Police, Redhills Police Station. On receipt of the complaint, PW18 registered a case in Crime No.1901 of 2015 [Ex.P13] for the offence under Sections 302 r/w 34 of IPC and produced the body for postmortem and thereafter disposed the same. On further investigation, coming to know

about the role of the accused, PW14, PW17 and PW18 went to Silchar, arrested the accused, who confessed about the murder and produced them before the Chief Judicial Magistrate, Silchar for transit warrant. After obtaining the transit warrant, brought the appellants to Chennai, on completion of investigation charge sheet came to be filed.

3.Before trial Court, prosecution examined 19 witnesses and marked 17 exhibits and 18 material objects. None were examined by the defence nor any exhibits marked.

4.The available evidence from the prosecution witnesses are as follows:

4.1.PW1 the Village Administrative Officer has stated that on 31.12.2015 at about 10.00 a.m on getting information from his Assistant PW2 on foul smell emanating from a gunny bag near the half constructed building, went to the place and informed to the Police. On opening the gunny bag, they saw a body in a decomposed state both the hands and legs were tied with rope and found the deceased person worn a green colour shirt, military brown colour half trouser, cash Rs.20/- on the shirt pocket. PW1 lodged a complaint [Ex.P1] before the Inspector of Police, Redhills Police Station.

4.2.PW4 the local resident has corroborated the evidence of PW1. PW5 and PW6 are the witnesses deposed about their signature on the Observation Mahazar [Ex.P2] and the Seizure Mahazar [Ex.P3] for the recovery of MO1 to MO3.

4.3.PW7 the Head Constable and trainer of the Sniffer Dog Squad which was pressed into the service in the investigation through his Dog Julie.

4.4.PW8 the daughter of the deceased had come along with her father from Silchar by train to meet A2. Thereafter on 18.12.2015 PW8 and the deceased stayed with the accused for two days. On 20.12.2015 there was a fight between the 2nd accused and the deceased. On the day itself at about 10.00 p.m when PW8 was sleeping in the house there was a noise and she woke up from the bed and saw the 1st accused assaulting her father with wooden log [MO5] and her mother/A2 shuttered her mouth and laid her to sleep. Thereafter on 21.12.2015, when PW8 asked about her father/deceased, A1 and A2 informed that the deceased has left to his native place. PW8 gave statement under Section 164(5) of Cr.P.C., before the learned Judicial Magistrate No.I, Thiruvallur and it was marked as Ex.P7.

4.5.PW12 has stated that on 21.12.2015 A1 asked PW12 to buy ticket for himself, A2 and PW8 to go to their native place. PW12 bought tickets and sent them by train at about 02.00 p.m.

4.6.PW10 the co-worker worked along with appellants in the Plastic Company as a Supervisor. PW10 has stated that when she was returning from her brother's house, saw the fight between A2 and the deceased on 20.12.2015 at a public place. PW10 intervened and asked them not to quarrel in a public place.

4.7.PW9 was running a Water Hose Pipe company near Redhills and he knew the accused persons. The 1st accused worked in his company for a short period. PW9 translated the confessions of the 1st and 2nd accused to Tamil. The admissible portion of the confession statement of 1st and 2nd accused were marked as Ex.P4 and Ex.P5 respectively. Pursuant to their confession, MO5 and MO6 were recovered in the presence of PW9 under Seizure Mahazar Ex.P6.

4.8.PW11 the Head Constable has recovered the Material Objects MO4, MO7 to MO14 and handed over the same to PW18. PW13 the Scientific Officer, Forensic Science Department, Chennai has examined the material objects and issued the report under Ex.P9.

4.9.PW14 the Sub Inspector handed over the requisition letter [Ex.P10] of PW18 to the Airtel Service Provider for details of the Sim Card [MO13] found in the body of the deceased.

4.10.PW15 the Judicial Magistrate No.I, Thiruvallur recorded the statement of witnesses on 25.01.2016.

4.11.PW16 the Postmortem Doctor had conducted the postmortem and issued report Ex.P12, he has opined that "the deceased would appear to have died of head injury".

4.12.PW18 the Investigating Officer on getting information about the accused were at Silchar, he along with PW14 and PW17 went to Silchar on 15.01.2016 at about 11.00 a.m, arrested the accused, produced them before the learned Chief Judicial Magistrate, Silchar, received the Transit Warrant and brought the accused to Chennai, seized the materials objects, examined witnesses, arrested the accused, recorded the confessions of accused, obtaining various reports, forwarded the material objects to Court under Form 95 and on completion of investigation, filed charge sheet for offences under Sections 302 r/w 34 of IPC.

5.On conclusion of the trial, the learned trial Judge put the incriminating materials to the appellants under Section 313 Cr.P.C., the appellants denied the same. Upon appreciating the

evidence let-in by the prosecution, the trial Court found the appellants guilty and convicted them as stated above. As against the conviction and sentence, these appeals have been filed.

6.The learned counsel for the appellants would submit that the appellants have been implicated in this case merely on suspicion, surmises and conjectures without any evidence. It is a known fact that the appellants were living as husband and wife for the past five years. The prosecution has projected a case as though the deceased was leading a wayward life and not taking care of his family, which made A2 to resort to such step. Even the daughter of the deceased/PW8 was not taken care and she discontinued his studies, employed in the house of one Sanjaykumar Dev. The deceased is said to have come to Chennai along with PW8, for which no documents have been produced. As regard the evidence of PW10 for the fight on the previous day in the Public Place and the evidence of PW12 who is said to have seen the deceased along with A1 and A2 on 18.12.2016 and 20.12.2016 and thereafter on 21.12.2016 has enquired about the deceased are all without any material. Therefore, the evidences of PW10 and PW12 are highly artificial.

7.PW12 admits that even for his travel to his native, his owner used to get ticket, for the reason that he does not know Tamil language. PW8 is the minor who was tutored by PW10 with whom PW8 is presently working. PW10 is obliging to PW9 and the version of PW8 is highly doubtful and her statement recorded under Section 164 Cr.P.C are contradictory and it is highly improbable that a person who has seen the assault and keeping quite and travelled along with the appellants to Silchar and in their native she did not inform anybody till such time the respondent police reached Silchar and arrested A1 and A2.

8.PW8 stated that the deceased was leading a wayward life and not taking care of his mother/A2, hence A2 got relationship with the 1st accused. The recovery of Sim Card [MO13] from the deceased Pant pocket is highly doubtful and the owner of the appellants were using the said Simcard. In order to complete the investigation, Since the case created sensation and to give quietest to the case the respondent implicated the appellants as accused. The evidence of PW16 the Postmortem Doctor is not in conformity with the case of the prosecution. Therefore, he prayed for acquittal.

9.Per Contra, the learned Additional Public Prosecutor appearing on behalf of the respondent would submit that in this case the accused, PW8 and the deceased are the native of Tripura state and they are well known to PW12. PW12 has categorically stated about the relationship between the accused and the deceased, the deceased had come to Chennai along with PW8 and

stayed with the accused/A1 and A2. PW10 has stated that when she was returning from her brother's house, saw the fight between A2 and the deceased on 20.12.2015 at a public place and she intervened and asked them not to quarrel in a public place.

10. When PW12 enquired the whereabouts of the deceased on 21.12.2016, the accused stated that the deceased went to his native place. PW10 had seen the deceased and A1 together in the market, also witnessed the fight between the accused and the deceased, PW10 intervened and pacified them, which is corroborated by the evidence of PW8, who stated about A1 and A2 were living as husband and wife for the past five years and the deceased was leading a wayward life and not taking care of his family, which made A2 to resort to such step and even PW8 was compelled by the deceased to work in the house of one Sanjaykumar Dev and discontinued her studies and she was leading a life as an orphan. PW8 the daughter of the deceased had come along with her father from Silchar by train to meet A2. Thereafter on 18.12.2015 PW8 and the deceased stayed with the accused for two days. On 20.12.2015 there was a fight between the 2nd accused and the deceased. On the day itself at about 10.00 p.m when PW8 was sleeping in the house of A2 there was a noise and she woke up from the bed and saw the 1st accused assaulting her father with wooden log [M05] and her mother/A2 shuttered her mouth and laid her to sleep.

11. It is a fact that on the day of occurrence, the accused, deceased and PW8 were living under one roof. PW12 is resident of Assam State, who is the friend of A1 and A2 has stated about the relationship of A1 and A2. The deceased is the husband of A2, PW8 is the daughter of the deceased and A2. The deceased and PW2 came to Chennai and stayed along with the accused from 18.12.2015. There was a quarrel between the deceased and A2 for washing over the clothes of the deceased and PW12 had compromised them. On 20.12.2015 PW12 along with the accused went to market and came back to house. On 21.12.2012 he went to the house of A1 enquired about the deceased. A1 replied that the deceased had gone to his native place. On 21.12.2015, the 1st accused asked PW12 to buy ticket for himself, A2 and PW8 to go to their native and the same was purchased by PW12.

12. The decomposed body of the deceased with pungent smell are spoken by PW1, PW2, PW3, PW4, PW5 and PW6. PW5 and PW6 are the witnesses for Observation Mahazar [Ex.P2] and Rough Sketch [Ex.P3]. The witnesses have given 164 Cr.P.C statements and they have deposed against the accused. PW18 the Investigating Officer on getting information about the accused at Silchar, PW18 along with PW14 and PW17 went to Silchar on 15.01.2016, arrested the accused, produced them before the learned Chief Judicial Magistrate, Silchar, received the Transit Warrant and

brought the accused to Chennai, seized the materials objects, examined witnesses, arrested the accused, recorded the confessions of accused, on obtaining various reports, forwarded the material objects to Court under Form 95 and on completion of investigation, filed charge sheet for offences under Sections 302 r/w 34 of IPC. The trial Court on examining the evidence has rightly convicted the appellants.

13.This Court considered the submissions made by the learned Counsel on either side and perused the materials on record.

14.The undisputed facts are that on 31.12.2015 at about 09.30 a.m PW1 was informed by PW2 who in turn was informed by PW3 about foul smell emanating from the gunny bag kept in an on going construction. PW4, PW5 and PW6 are the local residents who corroborate the said fact. Thereafter PW1 had come to the scene of occurrence, opened the gunny bag, found the decomposed body and maggots on the body and thereafter had gone to the Police, lodged a complaint [Ex.P1].

15.PW18 the Investigating Officer on registration of F.I.R in Crime No.1901 of 2015 [PW18] visited the scene of occurrence, prepared Observation Mahazar [Ex.P2] and Rough Sketch [Ex.P3] in the presence of PW5 and PW6, recovered MO1 to MO3. After conducting the inquest on the body of the deceased, PW18 sent the body for postmortem to PW16 through PW11. Thereafter, the Postmortem was conducted by PW16. During postmortem, the Material Objects MO4, MO7 to MO14 found in the body of the deceased as well as in the gunny bag were handed over to PW11, who inturn handed over to PW18. PW14 the Sub Inspector handed over the requisition letter [Ex.P10] of PW18 to the Airtel Service Provider for details of the Sim Card [MO13] bearing No.89911603000048011228 found in the body of the deceased. PW18 received the Customer Details (KYC Details) through Ex.P16. From the KYC details it is seen that the Simcard was sold at Tripura State. The accused belongs to Tripura State and they left to Tripura along with PW8, which was revealed through PW12. PW18 along with PW14 & PW17, by obtaining passport, proceeded to Silchar, Tripura, arrested the accused and produced them before the Chief Judicial Magistrate, Silchar and brought them by transit warrant to Chennai. Based on the confession of A1 [Ex.P4] and A2 [Ex.P5], MO5, MO15, MO16 were recovered.

16.PW8, the daughter of A2 has clearly stated that she and deceased came to Chennai on 18.12.2015, stayed along with the appellants. On 20.12.2015 there was a quarrel between the deceased and A2. PW10 has intervened and pacified the accused and the deceased who had quarreled in a public place.

17.PW12 the another person from North Eastern State has stated about the relationship of the appellants and the deceased, the presence of the appellants, PW8 and the deceased from 18.12.2015 to 21.12.2015. Thereafter the appellants informed PW12 that the deceased went to his native and A1 asked PW12 to purchase ticket for himself, A2 and PW8 for going to their native.

18.Thus it is proved that the deceased and PW8 stayed along with the appellants from 18.12.2015 and thereafter on 21.12.2015, the deceased was found missing which was enquired by PW12, who was informed by the accused that the deceased had left to his native. The decomposed body of the deceased was found on 31.12.2015. On 02.01.2016, the material objects from the gunny bag were found in which MO13 the Simcard was also found. The KYC particulars of MO13 obtained and thereafter the accused were arrested at Silchar and brought to Chennai and recovered the wooden log [MO5].

19.PW8 has categorically stated that on 20.12.2015, the deceased, PW8 and A1 & A2 were under the same roof. At late hours, PW8 heard cry and she woke up saw A1 assaulting the deceased. A2 had covered her mouth and made her to sleep. On 21.12.2015 PW8 asked about the deceased and A2 said that the deceased has left to his native. Thereafter PW8 was taken along by the accused to native.

20.Thus the assault of A1 with the wooden log [MO5] and dumping the body of the deceased was done by A1 and A2 has been proved. The decomposed body of the deceased was recovered and PW8 has categorically spoken about these aspects. One thing is certain that it was the deceased who called upon A2 and came to know about her whereabouts, had come and joined with A1 and A2 on 18.12.2015. PW8 admits that for the past five years A1 and A2 were living as husband and wife and her father deceased was leading a wayward life and he forced PW8 to work in the house of Sanjaykumar Dev. It is also stated that only one blow has been given on the forehead of the deceased, which is conformed by PW16 through his report [Ex.P12]. The relationship of A1 and A2 has been admitted there was no quarrel or animosity over that. The 1st accused had even got employment for the deceased. The deceased and PW8 were living together with the appellants, during their stay at Chennai. Only due to the quarrel between A2 and the deceased, the blow had been inflicted by the accused through MO5, which is not a deadly weapon. Subsequent act of concealing the the body could not be construed against the accused in bringing their act under one of the exceptions to Section 300 of IPC, and were punishable under Section 304 of IPC.

21.The Hon'ble Apex Court in the case of Rampal Singh Versus State of Uttar Pradesh reported in (2012) 8 SCC 289 has held the same set of facts and the relevant portion is extracted here under:-

"10.Having completed narration of the facts and noticed the precise contentions raised before us in the present appeal, we may now refer to the law on the subject. 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: -

12.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.

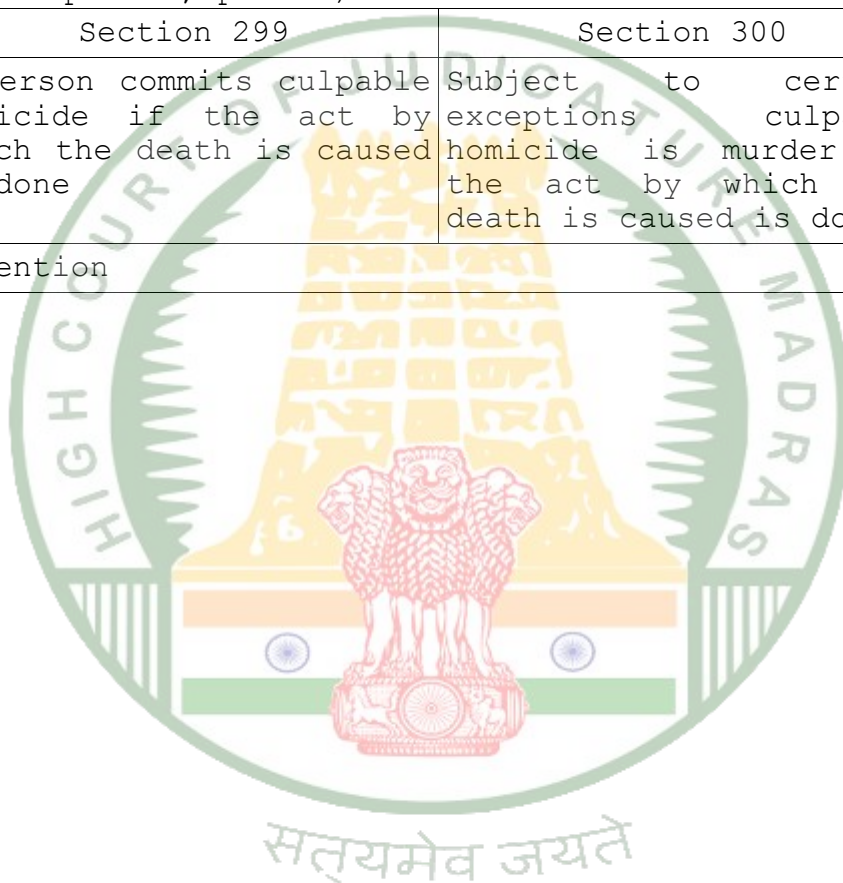
14. Section 300 of the Code proceeds with reference to Section 299 of the Code. Culpable homicide may or may not amount to murder, in terms of Section 300 of the Code. When a culpable homicide is murder, the punitive consequences shall follow in terms of Section 302 of the Code while in other cases, 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 the case of Phulia Tudu & Anr. v. State of Bihar (now Jharkhand)

[AIR 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 provided the following comparative table to help in appreciating the points of discussion between these two offences : (SCC p. 591, para 7)

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	



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Section 299	Section 300
(a) with the intention of causing death ; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death.	(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 (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as is mentioned above, '(Abdul Waheed case, SCC p.184, para12)

17. Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to murder. It is also murder when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to culpable homicide amounting to murder. The explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of

passion and without pre-mediation. Where the offender whilst being deprived of the power of self-control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, culpable homicide would not amount to murder. This exception itself has

three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case.

18. This Court in the case of Vineet Kumar Chauhan v. State of U.P. (2007) 14 SCC 660 noticed that academic distinction between murder and culpable homicide not amounting to murder had vividly been brought out by this Court in State of A.P. v. Rayavarapu Punnayya [(1976) 4 SCC 382], where it was observed as under: (Vineet Kumar case, SCC PP.665-66, para 16)

"16. ...that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of section 299 and 300 of the Code and the drawing support from the decisions of the court in Virsa Singh v. State of Punjab and Rajwant Singh v. State of Kerala, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the court said that wherever the 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 would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be that the accused has done an act by doing which he has caused the Rampal Singh vs State Of U.P on 24 July, 2012 Indian Kanoon - <http://indiankanoon.org/doc/12565578/5> death of another. Two, if 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 in the negative, the offence would be culpable homicide not amounting to murder, punishable under the First or Second part of Section 304, depending respectively, on whether this second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come 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 Code. It was, however, clarified that these were only broad guidelines to facilitate the task of the court and not cast-iron imperative."

19. Having noticed the distinction between murder and culpable homicide not amounting to murder, now we are required to explain the distinction between the application of Section 302 of the Code on the one hand and Section 304 of the Code on the other.

20. In *Ajit Singh v. State of Punjab* [(2011) 9 SCC 462], the Court held that (SCC p.468, para 20)

"20. In order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder...."

In other words, Section 300 states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut of culpable homicide that amounting to murder as well as that not amounting to murder in a composite manner in Section 300 of the Code.

21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special

to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of this section includes only those cases in which offence is really murder, but mitigated by the presence of circumstances recognized in the exceptions to section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in the case of Fatta v. Emperor, 1151. C. 476 (Refer :Penal Law of India by Dr. Hari Singh Gour, Volume 3, 2009)

22. Thus, where the act committed is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed.

23. An important corollary to this discussion is the marked distinction between the provisions of Section 304 Part I and Part II of the Code. Linguistic distinction between the two Parts of Section 304 is evident from the very language of this Section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merits. The

Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused.

24.A Bench of this Court in the case of Mohinder Pal Jolly v. State of Punjab [1979 AIR SC 577], stating this distinction with some clarity, held as under: (SCC pp.36-37, para11)

"11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause 4thly, then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."

25.As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the principle of exclusion. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminar finding if the accused had committed an offence punishable under the

substantive provisions of Section 302 of the Code, that is, culpable homicide amounting to murder. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused."

22.As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of premeditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime.

23.The relationship between the appellants are not disputed and they were living as husband and wife for the past five years is admitted by PW12, PW8 and further there is no grouse for the same. PW8 and the deceased travelled from Silchar and stayed with the accused. PW12 had seen the appellants and the deceased together in the market to purchase the articles, hence there was a cordiality between them. There seems to be some misunderstanding between A2 and the deceased which led to a fight between them. The 1st accused attacked the deceased in his forehead using MO5, which is a single blow. This version of the prosecution case is established by eye-witnesses/PW8, medical evidence and the recovery of the weapon [MO5]. The Learned Counsel appearing for the Appellant has rightly confined his submissions with regard to alteration of the offence from Section 302 to the one under Section 304 Part I of the Code.

24.From the above statement of the witnesses, it is clear that there was heated exchange of words between the deceased and the Appellants and the provocation was initiated by the deceased and thereafter the appellants have assaulted the deceased with MO5 and ultimately resulted in his death. It is not a case of previous animosity and nothing was there to show that the relationship between the appellant and the deceased was not cordial.

25. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW8 and PW12. The dispute between A2 and the deceased was with regard to the washing of his clothes and it is clear that the Appellant had not committed the crime with any pre-meditation. There was no intention on his part to commit murder. However the fact that the appellants had no knowledge that such injury could cause the death of the deceased cannot be countenanced.

26. Thus on the available evidence examined in its entirety shows that without any premeditation the appellant committed the offence. The same done with the intent to cause a bodily injury which could result in death of the deceased. Thus has held by various citations referred above, in our opinion, the offence committed by the Appellant was only culpable homicide not amounting to murder. Under these circumstances, we are inclined to bring down the offence from first degree murder to culpable homicide not amounting to murder, punishable under the first part of Section 304 IPC.

27. In view of the above, we partially accept this appeal and alter the offence that the Appellants have been found guilty of Section 304 Part I of the Code. Having held that the accused is guilty of the offence under Section 304 Part I, this Court awards a sentence of ten years rigorous imprisonment and a fine of Rs.10,000/-, in default to undergo simple imprisonment for one month. The judgment under appeal is modified in the above terms. These appeals are disposed of accordingly.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

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To

1. The IV Additional Sessions Judge,
Ponneri, Tiruvallur.

2. The Inspector of Police,
Redhills Police Station,
Chennai.

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3.The Public Prosecutor,
High Court, Madras.

4.The Judicial Magistrate,
Court No.II, Ponneri.

+2cc to M/s.V.Rajamohan, Advocate Sr.70427

Cr1.A.Nos.321 & 861 of 2018

cp[col]
srg 27/09/2019



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