

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.07.2019

Delivered on : 29.07.2019

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.191 of 2017

Saravanan, Age 35 years,
S/o Rajamani,
Thurinjikuppam Kollakottai,
Vaniyambadi Taluk,
Vellore District. Appellant/sole Accused

Vs.

The State, represented by
The Inspector of Police,
Alangayam Police Station,
Alangayam, Vellore District.
Crime No.117 of 2011 .. Respondent/complainant

Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code as against the judgment passed in S.C.No.179 of 2013 on the file of III Additional District and Sessions Judge, Tirupattur, Vellore District dated 24.01.2017 charged and convicted for the life for the offence punishable under Sections 302 IPC and to pay a fine of Rs.5000/-, in default to undergo three months simple imprisonment and convicted for three years under Section 3 read with 25(1)(b) of Indian Arms Act, 1959 and to pay a fine of Rs.1000/-in default to undergo three months simple imprisonment, while getting acquittal under Section 294(b) IPC.

For Appellant : Mr.V.Rajamohan

For respondent : Mr.R.Prathap Kumar,
Additional Public Prosecutor

JUDGMENT

M.M.SUNDRESH, J.

The appellant, being the sole accused in S.C.No.179 of 2013 on the file of III Additional District and Sessions Judge, Tirupattur, Vellore District, charged and convicted for the life for the offence punishable under Section 302 IPC and to pay a fine of Rs.5,000/-, in default to undergo three months simple imprisonment and for three years under Section 3 read with 25(1)(b) of Indian Arms Act, 1959 and to pay a fine of Rs.1000/- in default to undergo three months simple imprisonment, while getting acquittal under Section 294(b) IPC, has filed this criminal appeal.

2. Prosecution Version:

2.1. It is the case of the prosecution that the appellant being the son of the deceased-Rajamani indulged in a quarrel on 07.06.2011 at about 10.30p.m., and thereafter, came back and shot him with a country made gun resulting in instantaneous death.

2.2. P.W.1-Sundaramma is the mother of the appellant and thus, wife of the deceased-Rajamani. The appellant is the eldest son. P.W.4-Arunachalam, P.W.6 Thirugnanam and P.W.7 Indira Kumar are the sons and P.W.10-Thenmozhi and P.W.11-Lakshmi are the daughters of the deceased and P.W.1. P.W.2-Poonkodi is the grand daughter of the deceased. P.W.3-Pandu @ Pandian is the close relative of the deceased.

P.W.10 turned hostile and so also P.Ws.2 to 4 though they were not the eye witnesses. P.W.5, who is the grandson of the deceased, has stated that he has seen the appellant running with the countrymade gun marked as M.O.1(unlicensed). P.W.7 has deposed that he has been informed about the death and he knew about the frequent quarrel the appellant used to indulge with his father. P.W-8-Munidasan is the Village Administrative Officer, before whom the confession statement is stated to have been made followed by recovery. P.W.9-Sampath, who is the Inspector of Police, Alangayam, has inspected the place of occurrence and prepared Ex.P4-Observation Mahazar. P.W.10, the sister of the appellant speaks about the occurrence. According to her, the appellant picked up quarrel and shot the deceased, which was seen by her in the new moon light. She has further stated that she saw the body of the deceased-father first and in the new moon light. According to her, she alone saw the occurrence, but did not know the gun, which was used. She further acknowledged the fact that her father used to hunt.

2.3. P.W.11, the daughter of the deceased once again speaks about the motive. P.W.12-Dr.Sivasubramaniyam is the

Doctor, who conducted the post-mortem has given Ex.P7-post mortem report. P.W.13-Kirubhakaran is the Assistant Director of Forensic Department and he had authored Ex.P9-Chemical Analysis Report of the gun. P.W.14-Jayakumar is the Head Constable, who went to the Tirupattur Government Hospital on 08.06.2011 and handed over the requisition letter given by the Investigating Officer for conducting post mortem on the body of the deceased and thereafter handed over the body to the relatives. P.W.17-Mohan, the Inspector of Police is the Investigating Officer, who went to the place of occurrence and prepared Ex.P14-Rough Sketch and Ex.P15-Observation Mahazar in the presence of the witnesses. He also examined the witnesses and conducted inquest on the dead body of the deceased and prepared Ex.P17-Inquest Report. He also gave Ex.P6-requisition to conduct autopsy. He has arrested the accused on 15.01.2012 at about 11.30p.m., and recovered M.O.1-gun through recovery mahazar Ex.P19.

2.4. P.W.18 is the Inspector of police, who took up the further investigation and examined the witnesses and the doctor. After completing the investigation, he laid the final report against the accused for the offence under Section 302 IPC and Section 3 read with 25(1)(b) of Indian Arms Act, 1959.

3. Before the trial Court, the prosecution examined 18 witnesses in total as stated above and marked Exs.P1 to P23 apart from the material object recovered M.O.1-country made gun. After framing charges, the appellant was placed with the incriminating materials and questioned under Section 313-A of the Criminal Procedure Code. There was only mere denial by the appellant.

4. The trial Court rendered conviction against the appellant sentencing for life while acquitting him under Section 294(b) IPC holding that motive having been proved and the evidence of P.Ws.1, 7,10 and 11 are sufficient enough to convict the appellant and accordingly rendered conviction. Reliance has also been made on the evidence of P.W.12-Doctor, who conducted post mortem with reference to the usage of the gun causing fatal injury. The injury which is fatal, found to be on the lungs of the deceased as seen from Ex.P7 given by P.W.12-Doctor.

5. The learned counsel appearing for the appellant would submit that 1st of June, 2017 was the new moon day. There was no light available during night time. P.W.10 ought not to have been present in the place of occurrence since she was married and living somewhere else. P.W.1 has turned hostile and so also the other witnesses. Motive has not been proved as the other witnesses turned hostile. There is no evidence to show that the appellant was owning the gun. Even as per the evidence of P.W.10, her father used to hunt. The evidence of P.W.10 is

unnatural. No reliance can be made on the evidence of P.W.5. He has also stated that he did not know anything about the occurrence. He is also the interested witness. No reliance can be made on the confession statement made. The statement has been obtained while in police custody. The witness, who signed the confession statement has not been examined. Thus, under those circumstance, the conviction rendered by the Court below requires to be set aside.

6. The learned Additional Public Prosecutor appearing for the State submits that though most of the witnesses turned hostile, the trial Court rightly relied upon the evidence of P.Ws.5, 7, 10, 11 and 12. Even P.W.1 has stated about the estranged relationship. There is nothing to disbelieve or contradict the evidence of P.Ws.5 and 10. Recovery has been proved in the manner known to law. P.W.12 has also given a statement in tune with Ex.P7 about the nature of the death. Therefore, the contention raised cannot be sustained and thus, the appeal has to be dismissed.

7. By way of a reply, the learned counsel appearing for the appellant would submit that without prejudice to the contentions made, the case on hand would fall either under Section 304(Part-I) or (Part-II) IPC as the case may be. There must have been a quarrel on the date of occurrence i.e., on 07.06.2011. There is no material to hold that the appellant owned a gun. Therefore, this Court shall consider the alternative submission made while disposing of the appeal.

8. The learned Additional Public Prosecutor appearing for the State countering the abovesaid argument would submit that the evidence adduced is sufficient enough to convict the appellant for the offence punishable under Section 302 IPC as it is a case of murder and not mere homicide.

9. Though most of the witnesses turned hostile, the motive part has certainly been established. This could be seen from the evidence of P.Ws.1, 7 and 10 apart from P.W.11. All these witnesses have clearly deposed that the appellant was having motive on two counts. One is with respect to non performing of the marriage for the second time and that the other being the property not allotted to him. Therefore, there is no belief in holding that there is a prior enmity atleast from the point of view of the appellant with his father.

10. However, we find that the prosecution has not established that M.O.1 gun was owned by the appellant. It is the specific evidence given by P.W.10 that her father used to go for hunting, When that position is clear, then it cannot be stated that it is the appellant, who took the gun to shoot the

deceased. P.W.5 being grandson of the deceased speaks about the subsequent conduct of the appellant having seen the appellant running away with M.O.1-Gun. There is nothing to discredit the evidence of P.W.5. Similarly, P.W.10 has stated that he saw the deceased being shot by the appellant. Even here, she has stated that she did not know which gun it was. It is her clear evidence that the appellant picked up the quarrel with his father prior to the occurrence.

11. From the above, we are quite convinced that the appellant committed an offence of culpable homicide. Therefore, only other question to be decided is as to whether homicide is to be termed as murder or otherwise.

12. Though the prosecution witnesses have stated that the deceased was having food, Ex.P7 clearly says that there is no food particle in the stomach part. Even P.W.10 has not seen the occurrence in full. Ex.P7 shows that the injury that caused death was on the lungs. There was only one single shot. Thus, from the above, we find that it is the case which would fall under the second limb of Section 299 IPC.

13. Once we hold that the intention of the appellant was to cause such bodily injuries, which is likely to cause death and therefore, a culpable homicide would not amount to murder and the punishing section would be Section 304 (part-I) IPC. This, we hold so, while rejecting the contentions raised by the appellant on the recovery made and evidence of P.W.10, the contention that there was no proper light cannot be sustained, particularly, when the occurrence was within the house of the deceased and in the presence of his daughter. We may note that we are constrained to hold that the appellant must have taken the gun belonging to the deceased pursuant to the earlier fight and committed the offence. Therefore, it is a case which would fall under Section 304(Part-I) IPC. Since we have held that the appellant is liable to be punished for the culpable homicide committed by him under Section 304(Part-I) IPC, we would like to discuss the legal position with respect to the culpable homicide per se and the one amounting to murder along with the punishing provisions.

14. A culpable homicide would arise when a death is caused by a person on the other with an element of culpability through his act. While all such acts would come under Section 299 IPC, Section 300 IPC deals with culpable homicide amounting to murder. There are three limbs of culpable homicide being involved under Section 299 IPC as against four under Section 300 IPC.

15. Thus, culpable homicide is a genus and murder is one

of its specie. When a person commits culpable homicide by his act, which causes death, with the intention of causing such bodily injury, it becomes the culpable homicide per se and therefore not amounting to murder. The second limb has to be seen in comparison with the third limb of Section 300 IPC which is as under.

"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."

16. Therefore, the second limb of Section 299 IPC speaks about bodily injury, which is likely to cause death, while the third limb of Section 300 IPC deals with sufficiency of the injury in the ordinary course of nature to cause death. When once the offence committed comes within the purview of second limb of Section 299 IPC, then the punishing Section would be Section 304(Part-I) IPC. We may note that we are dealing with the intention of the offender as against his knowledge in which case 304(Part-II) IPC would arise. Hence, it comes within the third limb of Section 299 IPC or fourth limb of Section 300 IPC along with the special exceptions.

17. The existence of intention is to be gathered from the facts surrounding a case. Some of the factors to be kept in mind are gravity of motive, extent and location of injuries, nature of weapon used and the force involved, place of occurrence and persons in whose presence it was done. Thus, the question as to whether the case would come within the purview of Section 299 or 300 IPC and punishable under Section 304 (Part-I) or (Part-II) IPC as against 302 IPC depends upon factors governing. On the aforesaid issue, we are inclined to rely upon the following passage of the Division Bench of this Court in Ganesan Vs. State ((2013) 1 CTC 372).

"28. Now, we will examine as to whether the said act of the accused falls under the first limb of Section 299 I.P.C. or the first limb of Section 300 I.P.C. Both these limbs postulate "intention to cause the death". Intention is different from "motive" or "ignorance" or "negligence". Intention requires something more than the mere foresight of the consequences. Intention is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving the conceived end. Thus, in the case of intention mental faculties are projected in a set of direction. But, knowledge is a bare awareness of the likely consequences. Whether, in a given case, the accused had the "intention" or "knowledge" is a question of

fact (vide. Jaiprakash Vs. State of Delhi Administration - 1991 (2) SCC 32). Intention is a fact to be inferred from various other facts and circumstances involved in the given case, such as, the gravity of the motive, the gravity of the injury/injuries, number of injuries, seat of the injury/injuries, the force used, the weapon used, etc."

18. In the celebrated judgment rendered by the Apex Court in the State of Andhra Pradesh Vs. Rayavarapu Punnayya and another ((1976) 4 Supreme Court Cases 382) the aforesaid distinction has been dealt with with certain element of clarity. This distinction will have to be applied on the facts and circumstances of each case. The following paragraphs would be apposite.

"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 gravest form of culpable homicide which is defined in s. 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of s. 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 s. 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 minutiae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the key

words used in the various clauses of ss. 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of s. 299 corresponds with cls. (2) and (3) of s. 300. The distinguishing feature of the mens rea requisite under cl. (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the intentional 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 cl. (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 cl. (2) is borne out by illustration (b) appended to s. 300.

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
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(a) with the intention of causing death; or	(1) with the intention of causing death; 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

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(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 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 para 12)
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15. Clause (b) of s. 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under cl. (2) of s. 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 s. 300, instead of the words 'likely to cause death' occurring in the corresponding cl. (b) of s. 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 cl. (b) of s. 299 and cl. (3) of s. 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 cl. (b) of s. 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.

17. For cases to fall within cl. (3), it is not necessary that the offender intended to cause death, So long as death ensues from the intentional. bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant and anr. v. State of Kerala(2) is an apt illustration of this point.

18. In Virsa Singh v. The State of Punjab, (2) Vivian Bose j. speaking for this Court, explained the meaning' and scope of Clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under s. 300, 3rdly'. First, it must establish, quite objectively, that a bodily injury is present;. secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say,. that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly it must be ,proved that the injury of the type just described

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

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

20. Clause (c) of s. 299 and cl. (4) of s. 300 both require knowledge of the probability of the 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 cl. (4) of s. 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 s. 299. If the answer to this question is prima facie found in the affirmative, the stage for

considering the operation of s. 300, 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 s. 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 s. 304, depending, respectively, on whether the second or the third Clause of s. 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in s. 300, the offence would still be 'culpable homicide not amounting to murder' punishable under the First Part of s. 304, 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 tele-scoped into each other, that it may not be convenient, to give a separate treatment to the matters involved in the second and third stages.

19. The judgment referred supra has been quoted with an approval in a subsequent judgment rendered by the Apex Court in Rampal Singh Vs. State of Uttar Pradesh ((2012) 8 Supreme Court Cases 289). The following are the relevant paragraphs to be noted.

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.

15. 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-meditation. 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.

16. 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:

"....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 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."

17. 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.

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

19. 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)

20. 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.

21. 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.

22. 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 :

"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."

23. 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 preliminary 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."

20. The facts involved in the aforesaid case are somewhat similar to the case in which we are dealing. There was only one single hit from the fire arm. Noting down the fine distinction between 304(Part-I) and (Part-II) with respect to the knowledge and intention, the Apex Court applied Section 304 (Part-I) IPC while rendering its conviction.

21. The Apex Court in *Surain Singh Vs. State of Punjab* ((2017) 5 Supreme Court Cases 796), after considering the earlier judgments brought forth, the difference between internal knowledge on the one side and mere knowledge on the other side, while applying the exceptions given under Section 300 IPC, held as follows.

"13. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1, there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them

to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter.

14. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For

the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

.....

16. In Budhi Singh vs. State of Himachal Pradesh (2012) 13 SCC 663 this Court has held as under:-

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill,

it will obviously fall beyond the scope of culpable homicide not amounting to murder....
”

17. In Kikar Singh vs. State of Rajasthan (1993) 4 SCC 238, this Court held as under:-

“8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence,

at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

22. The trial Court, in our considered view, has not considered the aspect as to whether the offence committed is the culpable homicide either amounting to murder or not. It is the duty of the trial court to find out when it is convinced that an act of accused person constitutes a culpable homicide as to whether it is a culpable homicide not amounting to murder. Thus, we find that the conviction and sentence rendered by the trial Court require to be interfered with.

23. Though we are not invoking the exceptions provided under Section 300 IPC, as we find the case falling under second limb of Section 299 IPC, we modify the punishment rendered by the trial Court from the offence punishable under Section 302 IPC to Section 304(Part-I) IPC. Considering the facts and circumstances, we are inclined to sentence the appellant to undergo rigorous imprisonment for the period of 10 years.

24. However, insofar as the offence under Section 3 read with 25(1)(b) of The Indian Arms Act is concerned, as we have already concluded in our discussion, the appellant/accused had used an unlicensed firearm. In such view of the matter, we would like to confirm the conviction imposed by the trial court for offence under Section 3 read with 25(1)(b) of The Indian Arms Act and the sentence imposed thereunder require no interference at the hands of this court. Thus, the conviction and sentence imposed upon the appellant/accused to simple imprisonment for three years for offence under Section 3 read with 25(1)(b) of The Indian Arms Act stand maintained. Though we are confirming the conviction and sentence as imposed by the trial court for offence under Section 3 read with 25(1)(b) of The Indian Arms Act, we direct that the aforesaid sentence would run

concurrently along with the sentence imposed by this court under Section 304(Part I) of IPC in modification of the conviction and sentence imposed by the trial court under Section 302 of IPC.

25. Accordingly, the conviction and sentence imposed on the appellant-Saravanan under Section 302 of I.P.C. in S.C.No.179 of 2013 dated 24.01.2017 by the III Additional District and Sessions Judge, Tirupattur, Vellore District, are modified and instead, he is convicted for the offence under Section 304 (Part I) I.P.C. and sentenced to undergo rigorous imprisonment for a period of ten years. The conviction and sentence imposed by the trial court for offence under Section 3 read with 25(1)(b) of The Indian Arms Act stand confirmed. Both the sentences shall run concurrent. The above Criminal Appeal stands allowed in part. The appellant/accused shall undergo the remaining part of the imprisonment.

Sd/-

Assistant Registrar (Insp.Cell)

//True Copy//

Sub Assistant Registrar

raa

To

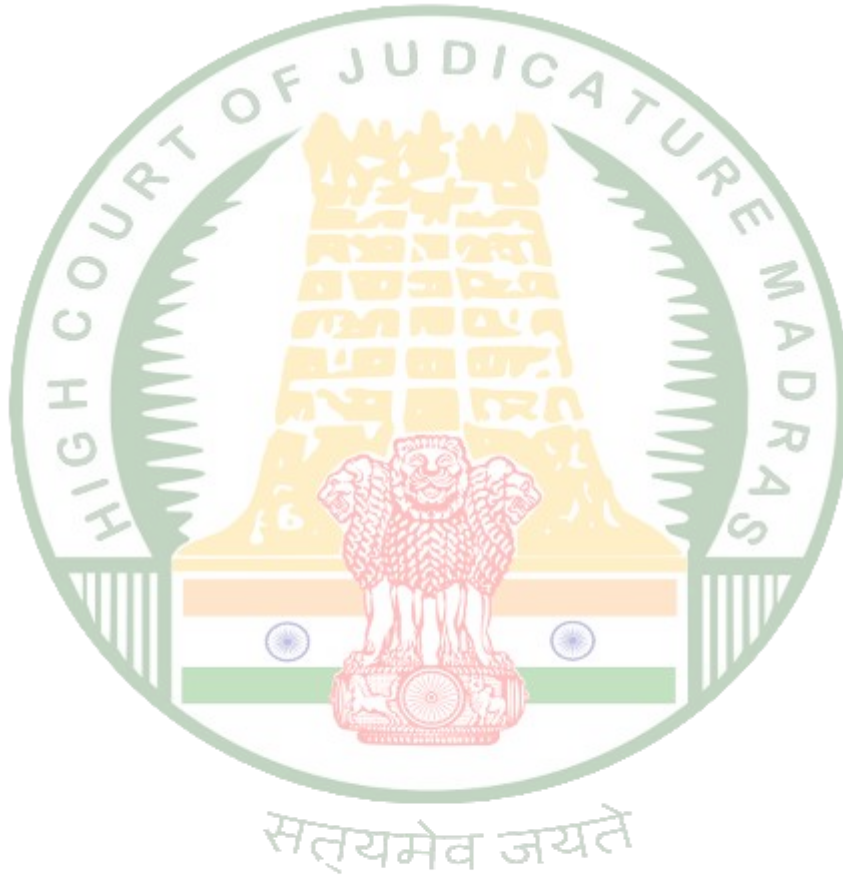
- 1.The III Additional District and Sessions Judge,
Tirupattur, Vellore District.
- 2.The Judicial Magistrate No.III
Tirupattur.
- 3.Do-Thro'The Chief Judicial Magistrate,
Vellore.
- 4.The Principle Session Judge,
Vellore.
- 5.The Inspector of Police,
Alangayam Police Station,
Alangayam, Vellore District.
- 6.The Superintendent,
Central Prison,Vellore.
- 7.The Additional Public Prosecutor,
High Court, Chennai.

8.The Section Officer,
Criminal section,
High court, Madras.

+1cc to Mr.N.Mohideen Basha,Advocate, SR.No.64391

KK(CO)
CB(12/09/2019)

Judgment in
Criminal Appeal No.191 of 2017



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