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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 589/2004

BANSI

..... Appellant

Through

Mr.Madhukar Pandey with
Ms.Damanjit Kaur, Mr.Shubham
Sharma and Mr.Pranesh Misra,
Advocates.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through

Mr.Rajat Katyal, Advocate for the
State with SI Sudhir Rathor PS Moti
Nagar.

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Date of Decision: 09th May, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present appeal has been filed challenging the judgment of conviction dated 15th May, 2004 and an order on sentence dated 19th May, 2004, passed by the learned ASJ whereunder, the appellant has been held guilty under Sections 302/307/324 IPC and sentenced to undergo imprisonment for life and to pay fine of Rs.500/- under Section 302 IPC. In default of payment of fine, he was directed to undergo simple imprisonment of two months. Further, the appellant has been sentenced to imprisonment for life under

Section 307 IPC and pay fine of Rs.500/-. In default of payment of fine, he was directed to undergo simple imprisonment of two months. Lastly, the appellant has been sentenced to undergo rigorous imprisonment for one year under Section 324 IPC. All the sentences were directed to run concurrently. The relevant portion of the Trial Court judgment dated 15th May, 2004 is reproduced hereinbelow:-

“27. PW1 Amrit Ram has fully supported the case of the prosecution on all the material points and in all the material particulars. He has stated that on the alleged date and time he was present at the house of his Phoopha, deceased Raj Kumar at Basai Dara Pur. At about 11 PM he was taking meal at the house of deceased Raj Kumar. His brother PW2 Chandeshwar was also with them at that time. In the mean time accused Bansi who was the neighbourer of deceased Raj Kumar came there and knocked at the door. Accused Bansi called Raj Kumar deceased and took deceased with him but deceased Raj Kumar returned to the house. Thereafter accused Bansi again came to the house of deceased and he again took deceased Raj Kumar with him. PW1 also accompanied with deceased Raj Kumar. He has further stated that deceased Raj Kumar and accused Bansi were taking liquor and that thereafter an altercation took place between deceased Raj Kumar and accused Bansi. Accused was locked inside his room and they bolted the room from outside. Accused Bansi again started abusing Raj Kumar deceased and accused continued abusing deceased. Accused was alleging that deceased Raj Kumar had illicit relations with the wife of accused and on that account he was abusing Raj Kumar deceased. Accused was saying that he would kill Raj Kumar and his wife. Thereafter deceased Raj Kumar went to the house of his landlord and brought him at the spot. Landlord also tried to make Bansi understand but he did not pay any attention. Deceased Raj Kumar then opened the kundi from outside and accused Bansi came outside the room. As soon as deceased Raj Kumar opened the door accused Bansi stabbed deceased Raj Kumar with a knife on his abdomen. After causing injuries to deceased Raj Kumar, accused Bansi also inflicted knife injuries to his wife on her abdomen. When PW1 Amrit Ram tried to intervene, he also received

injuries on finger of his left hand. Landlord then took deceased Raj Kumar to Khetarpal Nursing Home in a car where Raj Kumar died. Wife of accused Bansi was also removed to Handa Nursing Home, Raja Garden, Delhi.

PW1 has been cross examined on behalf of accused but nothing material came out from his cross examination which may help the accused in any manner. He has denied the suggestion that deceased Raj Kumar was having illicit relations with the wife of accused and that he was not present at the spot at the time of incident and is deposing falsely. He has also denied the suggestion that blood was not lifted from the spot in his presence. He has also denied the suggestion that he alongwith deceased Raj Kumar had torn off the clothes of wife of accused and also misbehaved with her and that he had inflicted the injuries on the wife of accused.

28) PW2 Chandeshwar has also supported the case of the prosecution on all the material points and has corroborated the testimony of PW1 in all the material particulars. Although he has also been cross examined on behalf of accused, yet nothing material came out from his mouth which may help the accused. He has stated in his cross examination on behalf of accused that accused Raj Kumar was not his relative and deceased was only known to him. He has denied the suggestion that he and deceased Raj Kumar had gone to the room of accused and that he and deceased Raj Kumar had torn the clothes of the wife of accused and also misbehaved with her. He has denied the suggestion that deceased Raj Kumar was having illicit relations with the wife of accused or that he is deposing falsely.

29) PW3 Satinder Singh is landlord of the house in which accused Bansi and PW2 Chandeshwar were living as tenants. He has also supported the prosecution case on all the material points except the fact that he cannot say how deceased Raj Kumar received injuries but he has stated that deceased Raj Kumar had told him that he had been hit by accused with knife on his abdomen. He has stated that he had not seen accused causing injuries to deceased Raj Kumar and that he had also not stated this fact to the police in his statement. He also stated that he had not seen accused causing injuries to his wife nor he had made any statement to the police. This witness has been declared hostile and permitted to be cross examined by the Ld. Addl.

PP for the State. He has denied all the suggestions of Ld. Addl. PP for the State in his cross examination. PW3 has not been cross examined on behalf of accused although opportunity for the same has been given to the Ld. counsel for accused. It remains unchallenged on record that deceased Raj Kumar had told him that deceased had been hit by accused with knife on his stomach.

30) PW7 Smt. Geeta is the wife of accused. She has not supported the prosecution case and has been declared hostile and has been permitted to be cross examined by the Ld. Addl. PP for the State. She has denied the suggestion that her husband accused Bansi had caused injuries to deceased Raj Kumar with a knife on his abdomen and when she intervened accused also caused injuries on her stomach with the same knife. She has also denied the suggestion that accused used to suspect her of having illicit relations with the deceased Raj Kumar. It seems that being wife of accused she has not supported the case of prosecution in order to save the accused from legal punishment. In her examination in chief she has stated that deceased Raj Kumar removed her clothes forcibly and deceased committed rape with her. In this respect PW15 Inspector SS Jakhar has stated that PW7 Smt. Geeta did not disclose about any rape. On enquiries PW15 came to know that accused had suspected his wife Smt. Geeta about some illicit relations and it could be the motive of murder. He has also admitted as correct that it was the reason for murder of deceased Raj Kumar. PW15 has stated that he recorded the statement of PW3 Satinder Singh and PW7 Smt. Geeta. He has also stated that he did not receive any complaint from any of the party before this incident. He has also denied the suggestion of Ld. Counsel on behalf of accused that he did not take any action against complainant Amrit Ram under Section 376 IPC. He has stated that Smt. Geeta did not allege anything about the rape. Plea of the accused Bansi appears to be an after thought.

31) The testimonies of PW1 Amrit Ram and PW2 Chandeshwar appear to be quite natural, reliable and trustworthy. Their presence at the spot at the time of alleged incident cannot be doubted. There is no reason on record as to why they should depose falsely against accused and as to why both of them should falsely implicate him in this case. The mere fact that PW1 Amrit Ram is the relative of

deceased Raj Kumar is not sufficient to discard his testimony. Moreover, PW2 has stated that Raj Kumar deceased was not his relative and that he was only known to him. There is no reason on record as to why PW2 should depose falsely against accused and as to why PW2 should implicate him in this case.”

2. The sentence of the appellant was suspended vide order dated 26th September, 2006. The appellant has undergone sentence for five years and one month and earned a remission for nine months and twenty-five days.
3. On 01st May, 2019, learned counsel for the appellant stated before this Court that he had instructions not to address arguments on merits of the case, but to address the Court on the order on sentence only. He had stated that it was a fit case where the conviction under Section 302 IPC ought to be modified to Section 304, Part-II IPC.
4. Mr.Madhukar Pandey, learned counsel for the appellant states that there was a sudden and instantaneous altercation without premeditation between the appellant and the deceased, while they were consuming liquor, on the issue of illicit relationship between the deceased and the wife of the appellant, which ultimately led to the appellant inflicting a single blow upon the deceased in the heat of passion with a small kitchen knife, which was already available in the room along with other utensils.
5. Learned counsel for the appellant points out that the prime eye witnesses in the present case are PW-1, PW-2, PW-3 and PW-7. He states that though PW-1 and PW-2 are relatives of the deceased, yet a bare perusal of their depositions would reflect that the appellant had accused PW-1 and PW-2 of misbehaving with his wife.
6. Learned counsel for the appellant contends that there is nothing on

record to show that the appellant had taken undue advantage of or acted in a cruel or unusual manner towards the deceased as he was locked inside a room at the instance of deceased by PW-1 and PW-2 and had no opportunity to do any overt act that was to his advantage.

7. He submits that the present case is beyond the scope of Section 300 IPC and at best the appellant could have been convicted under Section 304 Part-II IPC. In support of the submission, learned counsel for the appellant relies upon the judgments of the Apex Court in *Muthu Vs. State by Inspector of Police, Tamil Nadu, (2009) 17 SCC 433*; *Behra Vs. State of Rajasthan, (2000) 10 SCC 225* and *Kunhayippu Vs. State of Kerala, (2000) 10 SCC 307*. The relevant portions of the said judgments are reproduced hereinbelow:-

(i) *Muthu Vs. State by Inspector of Police, Tamil Nadu; (2009) 17 SCC 433*:-

“12. We may also refer to Exception 4 to Section 300 IPC which reads as under:

“Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.”

13. The difference between Exception 1 and Exception 4 to Section 300 has been explained by this Court in *Pappu v. State of M.P. [(2006) 7 SCC 391 : (2006) 3 SCC (Cri) 283]* In our opinion, the present case also comes under Exception 4 to Section 300 IPC since the ingredients of Exception 4 are all satisfied in the facts of the present case.

14. In our opinion, throwing waste and rubbish inside the house or shop of somebody is certainly a grave and sudden provocation. Everyone wishes to keep his premises neat and clean, and is likely to lose his self-control in such a situation. The incident in question

occurred in a sudden fight and a heat of passion by a sudden quarrel without the appellant having taken undue advantage or acted in a cruel or unusual manner. Hence the appellant is entitled to the benefit of Exceptions 1 and 4 and the case comes under Section 304 IPC.

15. The next question is whether the case will come under the first part or the second part of Section 304 IPC. In our opinion it will come under the second part in view of the decisions of this Court in Ramesh Vithalrao Thakre v. State of Maharashtra [(2009) 17 SCC 438 : AIR 1995 SC 1453] , Sarup Singh v. State of Haryana [(2009) 16 SCC 479 : (2010) 3 SCC (Cri) 329] , Mavila Thamban Nambiar v. State of Kerala [(2009) 17 SCC 441 : 1997 SCC (Cri) 726] , Sudhir Samanta v. State of W.B. [(1998) 1 SCC 581 : 1998 SCC (Cri) 461] , K. Ramakrishnan Unnithan v. State of Kerala [(1999) 3 SCC 309 : 1999 SCC (Cri) 410 : AIR 1999 SC 1428] , Tholan v. State of T.N. [(1984) 2 SCC 133 : 1984 SCC (Cri) 164] , Jagpati v. State of M.P. [1994 Supp (1) SCC 460 : 1995 SCC (Cri) 397 : AIR 1993 SC 1360] , Tarsem Singh v. State of Punjab [(2002) 2 SCC 673 : 2002 SCC (Cri) 465] , Hari Ram v. State of Haryana [(1983) 1 SCC 193 : 1983 SCC (Cri) 159 : AIR 1983 SC 185] , Randhir Singh v. State of Punjab [(1981) 4 SCC 484 : 1981 SCC (Cri) 856] , Kulwant Rai v. State of Punjab [(1981) 4 SCC 245 : 1981 SCC (Cri) 826] and Shankar v. State of M.P. [(1979) 3 SCC 318 : 1979 SCC (Cri) 632 : AIR 1979 SC 1532]”

(ii) Behra Vs. State of Rajasthan; (2000) 10 SCC 225:-

“2.The learned counsel further stated that even if the evidence of PWs 2 and 3 is believed, taking into account the fact and scenario under which the alleged assault was given by the accused, the offence could not be under Section 302 but at the best would be under Section 304 Part II. From the evidence of PWs 2 and 3 it is crystal clear that the accused and the deceased had some quarrel in the house of Bhana. On the road while they quarrelled with each other, suddenly the accused brought out the knife and gave the blow which struck the chest of the deceased. On these facts, it is difficult to hold that the

accused gave the blow with the requisite intention of causing murder of the deceased. In this view of the matter, the conviction of the appellant under Section 302 cannot be sustained. Since in anger while quarrelling, the accused had given the blow which ultimately resulted in the death of the deceased, the offence would be one under Section 304 Part II.”

(iii) Kunhayippu Vs. State of Kerala; (2000) 10 SCC 307:-

“2. Lastly, the counsel argued that even if the prosecution case is believed, then the offence would not be one under Section 302 inasmuch as the accused, who was on friendly terms with the deceased till asking for a glass of juice, suddenly gave one blow and that was from the back side which, of course, ultimately became fatal.

3. Having examined the rival contentions and on scrutinising the two judgments and the evidence of the two eyewitnesses, though we agree with the submission of the learned counsel for the appellant that examination of Ashok Kumar could have unfolded the prosecution case in detail but the impugned judgment of the High Court indicates the reasons as to why Ashok Kumar could not be examined, even though he was to be examined by the Court itself as Witness 1, and according to the impugned judgment, the whereabouts of the said Ashok Kumar could not be found out for which he could not be examined From the evidence of PW 1 it appears that both the accused and the deceased were in a friendly mood when one asked for a glass of juice from the other. Shortly thereafter while the deceased had left the shop of PW 1, the accused went behind and gave the blow in question and further, the blow in question had been given from the back side and only a single blow had been given. In these circumstances, it is difficult for us to hold that the accused can be said to have had the necessary intention for causing the murder of the deceased while giving the blow in question, though ultimately the blow had become fatal. We, therefore, set aside the conviction of the appellant under Section 302 and convict him under Section 304 Part II and sentence him to imprisonment for 5 years.”

8. He emphasises that the weapon allegedly used by the appellant was a

small vegetable knife, the dimensions of which were such that the appellant could have no knowledge that its single blow could prove fatal and/or likely to cause death of the deceased.

9. Learned counsel for appellant lastly states that the appellant-accused is aged about 50 years and is the sole bread earner of his family comprising his wife and three children. He states that his wife is a mere housewife, while his eldest daughter and son are both unemployed and financially dependent on him. He also states that his youngest daughter is only aged about 10 years and the appellant being a man of indigent means has to struggle to make the ends meet for his family and grave prejudice would be caused to him as well as his family in case the relief prayed for is not granted.

10. Per contra, learned counsel for the State submits that the essential pre-conditions for application of Exception 4 to Section 300 IPC read with Section 304 Part-II are that there must be a mutual combat or sudden fight— which is missing in the present case.

11. In support of his submission, he relies upon the judgment of the Apex Court in **Kikar Singh Vs. State of Rajasthan; AIR 1993 SC 2426**, wherein it has been 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 wound 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 S.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 of 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. In Pandurang Narayan Jawalekar v. State of Maharashtra [1979] 1 SCC 132: (AIR 1978 SC 1082), the facts proved were that the appellant gave a blow on the head of the deceased old man who was advising him not to quarrel. The injury caused to the brain from one end to the other resulted in fracture as could appear from the evidence of the doctor. It would show that the accused must have struck the blow on the head of the*

deceased with an iron bar with very great force. Accordingly it was held that exception 4 does not apply though there was sudden quarrel and that the fight was not premeditated to cause death. It must be shown that the injury caused is not cruel one. The conviction for offence under S.302 by the High Court reversing the acquittal by trial court was upheld.

10. If the weapon used or the manner of attack by the assailant is out of all proportion to the offence given that circumstance must be taken into consideration to decide whether undue advantage has been taken. Where a person, during the course of sudden fight, without premeditation and probably in the heat of passion, took undue advantage and acted in a cruel manner in using a deadly weapon there was no ground to hold that his act did not amount to murder. Therefore, if the appellant used deadly weapons against the unarmed man and struck him a blow on the head it must be held that he inflicted the blows with the knowledge that they would likely to cause death and he had taken undue advantage. He did not stop with the first blow, he inflicted two more blows on the fallen man and the third one proved to be fatal. He acted cruelly with no justification. By his conduct the appellant denied himself of the benefit of exception 4 to S. 300 I.P.C.”

12. Having heard learned counsel for the parties and having perused the evidence on record, this Court is of the view that it is essential to first outline the scope and ambit of Exception 4 to Section 300 IPC. Exception 4 to Section 300 IPC, reads as under:-

“Exception 4. – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

13. In the opinion of this Court, to invoke this exception, four ingredients have to be satisfied i.e. (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the

assailant had not taken any undue advantage or acted in a cruel manner.

14. One of us i.e. (Hon'ble Ms. Justice Sangita Dhingra Sehgal sitting in a Division Bench) had an occasion to explain the ambit and scope of Section 304 IPC as well as Exception 4 to Section 300 IPC in ***Vijay Pal. Vs. State (Govt. of NCT of Delhi); Crl.A.No.1653/2014 dated 05.2.2015*** The relevant portion of the said judgment is reproduced hereinbelow:

“Whether the offence falls under the purview of Section 304 Part-I

35. In *Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh* (2006) 11 SCC 444 the Supreme Court enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused. The Court observed:

...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls Under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section

302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the

weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...

36. The Appellant was convicted u/s 302 of the IPC in which he was convicted by the Learned ASJ Sh. Rajeev Bansal in the impugned judgment, but on further evaluation and as contended by the appellant the crime in the instant case does not fully fall within the ambit of section 300 of the IPC which reads as under:

300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- Secondly- If it is done 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- Thirdly- If it is done 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 committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, or-

Fourthly- If the person committing the act knows that it 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 aforesaid.

Exception 1- When culpable homicide is not murder- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defense.

Exception 2- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defense without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defense.

Exception 3- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5- Culpable homicide is not murder when the

person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

302. Punishment for murder.--Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

The crime committed by the appellant may be said to have been committed without premeditation in a sudden fight in the heat of passion.

37. In Chacko @ Aniyan Kunju and Ors. Vs. State of Kerala (2004) 12 SCC 269 it was held that :

All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type

10. The academic 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. Distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections

299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:

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

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

The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in Clause

(b) of Section 299 conveys the sense of probability 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.

38. For cases to fall under Clause (3) it is not necessary that the offender intended to cause death so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant Singh v. State of Kerala AIR 1966 SC 1874 is an apt illustration of this point. In Virsa Singh v. State of Punjab 1958CriLJ818 Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

39. In Shiv Kumar Vs. State (NCT) of Delhi 2014(2) JCC1 282, it was held that in dealing with Exception 4 to section 300 in Mahesh Balmiki versus State of Madhya Pradesh, (2000) 1 SCC 310, it has been observed:-

"7. Now Exception 4 to Section 300 IPC is in the following

terms:

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault. The requirements of this exception are:

- (a) without premeditation in a sudden fight;*
- (b) in the heat of passion upon a sudden quarrel;*
- (c) the offender has not taken undue advantage; and*
- (d) the offender has not acted in a cruel or unusual manner.*

Where these requirements are satisfied, culpable homicide would not be murder."

40. In the instant case all the requirements of the exception are met. As to whether the offender has not acted in a cruel or unusual manner, we must consider the actions of the appellant before and after the crime. The crime itself may be said to have been committed suddenly in the heat of the moment, but his act of fleeing immediately after committing the offence and later informing the police and requesting them to send an ambulance to the location must be considered. Nothing unusual can be found in his actions, there was no premeditation, and he cannot be said to have taken undue advantage. Vide Ankush Shivaji Gaikwad Vs. State of Maharashtra AIR 2013 SC 2454: 2013 Cri J 3044.

41. In Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528 and Sukbhir Singh v. State of Haryana (2002) 3 SCC 327, it was seen that :

...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of

the prosecution that the accused Appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 Indian Penal Code is clearly applicable...

Thus we may say that the offence is not murder, but culpable homicide not amounting to murder as under section 304.

42. Section 304 of the IPC is as under:

304. Punishment for culpable homicide not amounting to murder.--Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Section 304 consists of two parts, the first dealing with second degree culpable homicide and the second dealing with third degree culpable homicide as has been noted above. The distinction between 304 Part I and Part II has been drawn by the Hon'ble Supreme Court in Alister Anthony Pereira 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....

43. *In Vijay Ramkrishan Gaikwas V. State of Maharashtra (2012) 11 SCC 592, it was observed that*

The occurrence thus has the features of an incident in which an injury is inflicted in a sudden fight without pre- meditation in the heat of passion upon a sudden quarrel within the contemplation of exception 4 to Section 300 of the Indian Penal Code, which takes the case out of the purview of murder as defined in the said section. It is true that only one injury was caused to the deceased but the same is not conclusive by itself, for even a single injury can in a given case constitute murder, having regard to the weapon used and the part of the body chosen for inflicting the injury. The legal position in this regard is well settled by the decision of this Court in Bavisetti Kameshwara Rao alias Babai v. State of Andhra Pradesh : 2008 (15) SCC 725:

(Para 13) It is seen that where in the murder case there only a single injury is, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Pan II Indian Penal Code. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the Learned Counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous. ”

15. Subsequently, another Coordinate Bench of this Court in ***Ajay Bind Vs. State NCT of Delhi; 2017 SCC OnLine Del 0933*** has held that where on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. The relevant portion of the said judgment is reproduced hereinbelow:-

“57. In this regard, we may also refer to the pronouncement of the Supreme Court reported at Pulicherla Nagaraju @ Nagaraja Reddy v. State of A.P., (2006) 11 SCC 444 wherein it was held as follows:

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in

causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.”

58. In this regard, reference may also usefully be made to a pronouncement of the Supreme Court reported at (1997) 2 Crimes 185 (Mad.), *Samuthram @ Samudra Rajan v. State of Tamil Nadu* wherein it was held as follows:

“To invoke Exception 4 to Section 300, four requirements must be satisfied, namely (i) it was a sudden fight, (ii) there is no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.... The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly;”

(Emphasis supplied)

59. The evidence extracted above shows that the weapons were not carried by the appellants but were picked up from the spot. The acts were in the course of a sudden quarrel and the incident

occurred by chance without any pre-meditation. There is no evidence at all of previous enmity. On the contrary, the deceased was a stranger to the appellants who was visiting the matrimonial home of his daughter in the vicinity where the quarrel took place. The incident was a result of the appellants getting provoked and in a heat of passion.

60. In fact, the appellants were quarrelling amongst themselves and it was the deceased and his family who came out of their home to intervene resulting in the quarrel.

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63. Thus tempers of the appellants were already running high. The evidence of Rampal (PW-6) is that the appellants were quarrelling under the influence of alcohol. The intervention by the deceased to loudly command the appellants to keep quiet resulted in the attention and ill temper becoming directed towards the deceased. It was in this atmosphere of heightened temper that Ajay Bind picked up the hammer lying at the spot. The other two picked up the danda and the saria lying there itself. None of these are dangerous weapons but ordinary tools lying on the spot which came to be used as weapons. Clearly, the evidence establishes that there was no pre-meditation and that the violence was a result of sudden provocation in an ongoing fight between the appellants from a stranger (the deceased).

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67. Therefore, the conviction of the appellants vide impugned judgment dated 22nd March, 2016 and sentence vide impugned order dated 29th March, 2016 by the ld. Additional Sessions Judge-05 (West), Tis Hazari Courts, Delhi in Sessions Case No. 44/15 arising out of FIR No. 291/2011 registered at P.S. Nihal Vihar under Sections 323/302/34/174A of the IPC is modified to one under Section 304 Part II of the Indian Penal Code, 1860."

16. This Court has gone through the evidence on record and is of the view that appellant is the perpetrator who had caused stab injury resulting in death

of Raj Kumar. However, there was no intention to cause death as there was a sudden and instantaneous altercation between the appellant and deceased, while they were consuming liquor, on the issue of illicit relationship between the deceased and wife of appellant which led to rising of temper and in the heat of the moment the appellant inflicted a single blow upon the deceased in the lower abdomen with a small vegetable knife and also to his wife in the abdomen.

17. Lack of intention on the part of the appellant is apparent from the facts that the knife was not procured by the appellant prior to the altercation and the appellant had inflicted a single blow on the body of the deceased and his wife under intoxication.

18. This Court is of the opinion that ***Kikar Singh vs. State of Rajasthan*** (supra) is clearly distinguishable on facts inasmuch as the appellant herein did not use a deadly weapon and appellant did not act cruelly and did not take undue advantage. The appellant in the present case gave one blow only, unlike in ***Kikar Singh vs. State of Rajasthan*** (supra) where the accused gave three blows and that too when the deceased had fallen on the ground.

19. However, this Court is of the view that the appellant had knowledge that a knife injury as caused by him was sufficient to cause death in the normal course of events. Dr. Manoj Nagpal, DDU Hospital who deposed as PW-10 has confirmed the said fact. The relevant portion of PW-10's deposition is reproduced hereinbelow:-

“On 24.9.2001, I had conducted the post mortem on the dead body of Rajkumar S/o Soni Lal age 30 years. On examination I found the following injuries on the dead body of Rajkumar:

1. Penetrating wound present on the abdomen 2 Cm. lateral to left side of umbilicus and 13 Cm. above Cubic synphysis measuring

1.5 x 2.5 Cm. Clean cut well defined borders and spindle shape. The injuries crossed the abdominal muscles and piercing the small intestines at two places through and through. In the course of penetration the injury also pierced the mesentry.

2. Bruise 2 x .8 Cm. 15 Cm. to the right of umbilicus and 6 Cm. below coastal margin.

Injury no.1 is sufficient to cause death in normal course of events.....

(emphasis supplied)

20. Keeping in view the aforesaid mandate of law as well as the factual findings, this Court is of the view that appellant is entitled to benefit of Exception 4 to Section 300 IPC and consequently, is convicted under Section 304 Part-II IPC.

21. This Court is of the view that ends of justice would be met if the sentence of the appellant is reduced to seven years rigorous imprisonment. Accordingly, appellant is sentenced to seven years rigorous imprisonment under Section 304 Part-II IPC. Sentence of fine stands unaltered.

22. It is further observed that as per evidence on record appellant has given stab injury to his wife and his conviction under Section 307 IPC is upheld. However, looking into the facts and circumstances of the case, the sentence under Section 307 IPC is also reduced to seven years rigorous imprisonment, while maintaining the fine imposed by the learned Trial Court.

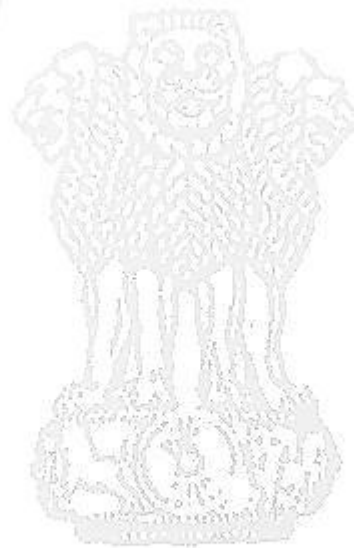
23. At this stage, learned counsel for the appellant prays for some time to surrender before the Trial Court. The appellant is permitted to surrender before the Trial Court within four weeks to serve out the remainder of his sentence. Both the sentences shall run concurrently and benefit of Section 428 Cr.P.C. stands granted.

24. With the aforesaid directions, present appeal stands disposed of. Copy of judgment be sent to Trial Court for compliance. Copy of judgment be also given dasti to the appellant.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MAY 09, 2019
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