

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.780 OF 2015

Ashok s/o. Chindha Birhade,
Age. 26 years Occu. Labourer,
R/o. Fapore(Bk.) Tq. Amalner,
Dist. Jalgaon.

...APPELLANT
(Orig. accused)

-VERSUS-

The State of Maharashtra.

...RESPONDENT

...
Advocate for the Appellant : Shri Satej S. Jadhav
APP for the Respondent/ State : Shri K.S.Patil.
...

**CORAM : RAVINDRA V. GHUGE
&
B. U. DEBADWAR, JJ.**

DATE :- 07th and 08th October, 2020

JUDGMENT (Per Ravindra V. Ghuge, J.) :-

1 Seldom could have anybody imagined that a Bitter Gourd (*Karela* in Hindi and *Karla* in Marathi), known for its medicinal value and health benefits, could have led to the death of a person and conviction of an accused for having caused such a death, to suffer a sentence of imprisonment for life. Bitter Gourd is considered to be a gift of God to humanity in view of its medicinal properties as it is a rich source of vitamins and minerals. It contains iron, magnesium, potassium and

vitamins like A and C. It contains twice the calcium of spinach and beta-carotene of broccoli. Various anti-oxidants and anti-inflammatory compounds are present in bitter gourd. This gift of nature protects humans and especially the liver, spleen, pancreas, etc. and is believed to be instrumental in reducing bad cholesterol, in harmonizing blood pressure and gifting a human with good health. The flash point in this case was that the *Karela* creeper planted by Kesharbai (mother of the appellant/accused) between the two neighbouring plots, was uprooted by neighbour Devidas (the deceased), which began a bitter quarrel between the two families.

2 The appellant/ accused Ashok Chindha Birhade is before us on account of having suffered conviction for an offence punishable under Section 302 of the Indian Penal Code and has been sentenced to suffer life imprisonment, vide the impugned judgment and order dated 10.09.2015 delivered by the learned Additional Sessions Judge, Amalner in Sessions Case No. 61 of 2012. This case rests on the testimonies of three eye-witnesses.

3 We have heard the extensive submissions of Shri Jadhav, learned Advocate on behalf of the appellant and of the learned APP on behalf of the respondent/State. With their assistance, we have gone through the appeal paper book and the record and proceedings, threadbare. Wherever we noticed a discrepancy in the recording of

testimonies in English, we have referred to the Marathi version available in the record and proceedings. We need to clarify that we have frequently referred to the Marathi recording of depositions of witnesses because in the case in hand, we peculiarly find several discrepancies in the English version when compared with the actual recording of testimonies in vernacular.

4 The prosecution has succeeded in acquiring conviction before the Trial Court in the light of the following facts:-

a) One, Bhikan Bhela Patil, supposedly an eyewitness and the first informant, lodged a complaint with the Amalner Police Station on 16.09.2012. He has stated that he was on a visit to the house of his sister, namely, Pramilabai w/o Devidas Patil, at Fapore (Bk.), Tq. Amalner, Dist. Jalgaon. His brother-in-law Devidas (the victim who has died) was 70 years of age. On 14.09.2012, Devidas and Bhikan were present in the house, when their neighbour Kesharbai Birkhade and her son Ashok, alongwith some relatives, took up a quarrel with Devidas, over the uprooting of a Bitter Gourd creeper by Devidas. On 16.09.2012, at about 08.30 a.m., Kesharbai again took up a quarrel with Devidas and one of her grandchildren, namely, Nehul Vinod abused Devidas. Bhikan had pacified them by intervening in the dispute. Two grandchildren of Devidas, namely, Dipali Patil and Sunil Patil were present in the house.

b) At around 12.30 p.m. on 16.09.2012, Ashok, who is the son

of Kesharbai and was not party to the quarrel that took place at 08.30 a.m., appeared in front of the door of Devidas's house. He is said to have abused Devidas and intimidated him by saying that Devidas should come out since he (Ashok) desires to kill him. Bhikan has mentioned in the complaint that after he heard the commotion, he came out of the house and at that time, the appellant Ashok Birhade assaulted Devidas with a sickle. A single blow injury on the neck of Devidas was caused by Ashok and when he saw Devidas bleeding, he ran away by throwing the sickle in his own goat shed. Bhikan rushed towards Devidas. Family members are said to have carried Devidas into the house. It was contended that Devidas passed away instantaneously.

c) After the FIR was registered, the police commenced investigation. They have traced out the sickle which was at a distance of about 50 feet from the front yard (Otta) of Devidas. In all, 14 witnesses were examined by the prosecution, who are as follows :-

PW1 - Bhikan Bhila Patil (complainant)

PW2 – Hari Yashwantrao Patil (Panch)

PW3 - Jitendra Dinkar Patil (before whom the accused is believed to have given an extra judicial confession)

PW4 - Appa Tanku Patil (Panch)

PW5 - Dattu Bhila Patil (Panch)

PW6 – Bhimrao Baliram Patil (eye witness)

PW7 - Dr. Govind Madhavrao Patil (Autopsy Surgeon)

PW8 – Dr. Prakash Kisan Tade

PW9 - Dipali Shivaji Patil (eye witness and minor grand daughter of the deceased)

PW10 – Sanjay Bhavrao Patil (Photographer)

PW11 - Shantaram Pandurang Patil (Circle officer)

PW12 - Nana Mitharam Pardhi (Police head constable (carrier))

PW13 - Nitin Kailas Lohare (Panch)

PW14 - Ramdas Sukdeo Patil (Police Inspector (I.O.))

d) The prosecution has placed reliance on the following documents :-

Exhibit 24 – Complaint / FIR Exhibit 24.

Exhibit 26 – Spot Panchanam

Exhibit 30 – Inquest Panchanama

Exhibit 44 – Postmortem report

Exhibit 45 – Provisional death certificate

Exhibit 46 – Letter for seeking opinion of expert.

Exhibit 47 – Opinion of doctor

Exhibit 50, 51 and 55 – Requisition letters,

Exhibit 56, 57 and 58 – Maps

Exhibit 59 – letter

Exhibit 63 – letter / endorsement

Exhibit 65 – Seizure Panchanama

e) The Trial Court has noticed that PW-1, first informant, and PW-9, who is a girl child and an eye witness, have testified for bringing home the guilt. PW-3 Jitendra, who belongs to the same village and the community (as per his statement in cross examination), was the person before whom the appellant/ accused had made an extra judicial confession. The testimony of these witnesses was appreciated and the Trial Court concluded that the offence alleged to have been committed by the appellant, has been proved and handed down a sentence of imprisonment for life along with a fine of Rs.5,000/-, in default of payment, to suffer rigorous imprisonment for two years.

5 The learned Advocate for the appellant has put forth extensive submissions, which can be summarized as follows :-

a) The narration of PW-1, who claims to be an eye witness, is not credible. In fact, he is a manufactured witness. He is the brother-in-law of the deceased and can, therefore, be treated as an interested witness.

b) Though several villagers gathered at the scene of the crime, none amongst them was examined.

c) It was not a planned murder, if held to be proved, as it has happened on account of anger and sudden provocation.

d) PW-6 Bhimrao, who claims to be an eye witness, is the nephew of the deceased and was never an eye witness.

e) The accused Ashok never intended to kill Devidas.

f) The accused had never carried any weapon to kill Devidas.

g) He had returned from the agricultural field and was enraged as his mother and wife had been abused by Devidas.

h) The sickle was claimed to have been found at a distance of about 50 feet inside Ashok's goat shed (*Gotha*).

i) PW-3 has indulged in improvising of his testimony since, he had not recorded in his statement to the police that the accused had requested PW-3 to take him to police station as the villagers would beat him up.

j) Devidas was an aggressor.

k) The accused is neither an aggressor nor has any criminal record.

l) Even if it is assumed that the offence was committed by the accused Ashok, he neither had any intention of killing Devidas, nor was he aware that his single blow of the sickle on the neck of the deceased could have caused his death.

m) Neither was he having the intention of causing such bodily

injury as was likely to cause the death of Devidas, nor did Ashok feel that the injury was likely to cause his death in the ordinary course of nature.

n) Even if it is presumed that Ashok has given an extra judicial confession to PW3, it would indicate that Ashok himself wanted to be taken to the police station which establishes that he had every remorse and regret for the act committed by him in a fit of anger.

o) Even if it is believed that Ashok had used the sickle to strike Devidas, he had regretted of having used the sickle since the incident had occurred in a fit of rage upon learning that Devidas had abused the mother and the wife of Ashok when he was away from home.

p) Though the sickle is a part of the muddemal and was before the trial Court, the C.A. report with regard to the sickle was never before the trial Court.

q) If at all it is concluded that the death of the deceased is on account of the act of the accused, circumstances visible would indicate that the said offence was committed due to grave anger, intense feelings and a sense of shame that his mother and wife were abused by Devidas.

r) Even if the single blow of the accused may have caused the death of Devidas, such conduct would fall within Section 304 Part-I or Part-II and would not amount to culpable homicide amounting to murder.

s) The fact that Ashok, after learning about his mother and wife having been abused, had rushed to the neighbouring house of Devidas

with empty hands. Had he had any intention of planning the murder of Devidas, he would have carried a weapon with him in all preparedness which would have exhibited an intention in his mind to murder Devidas.

t) If the case of the appellant falls under Part-II of Section 304, coupled with he having no criminal history, the sentence could be modified and Ashok could be awarded with a sentence of imprisonment already undergone or upto a maximum of 10 years. He has been in jail since 2013.

u) Reliance is placed on the judgment delivered by the Hon'ble Supreme Court in *Virsa Singh Vs. State of Punjab, AIR 1958 Supreme Court 465*.

6 Shri Patil, the learned APP has vehemently opposed the appeal. He submits that the accused Ashok may have got angry after hearing one side of the story of his mother and wife having been abused. He had rushed to the house of Devidas and had challenged him in a loud voice by asking him to come out of the house so that Ashok could kill him. He had uttered the sentence in Marathi as "बाहेर ये, तुझा मुडदा पाडतो" (*come out, I will kill you*).

7 He further submits that the testimony of eye witnesses would indicate that Devidas was sitting in the front room adjacent to the *Otta*

and his two grandchildren were along with him. Bhikan was sitting in the last room of the three rooms house and could see right upto the *Otta* as the three rooms were in a single line. After Devidas confronted Ashok, they became physical and as narrated by PW-6, they had wrestled with each other. PW1 Bhikan has deposed that Ashok returned to his house for bringing a weapon, picked up a sickle and came back towards Devidas to give him a single heavy blow on his neck, which severed his carotid artery and caused his death instantly. Eye witness PW-9, grand daughter of Devidas, has deposed that Devidas was already carrying a sickle in his hand.

8 Reliance is placed upon *Suraj Bhan Vs. State of Haryana, 2003 AIR (SC) 785*, to support the case of the prosecution that even a single blow knowingly inflicted on a vital part so as to cause the death of the victim and knowing fully well that it was likely to cause death, can be said to be an act of culpable homicide amounting to murder. He then submits that the ingredients of Section 300 could be analyzed by this Court as against Section 304, to test the contention of the appellant. The deceased was more than 70 years of age and was a weak old grand father. The accused Ashok was a young and able bodied person of 26 years age. As he used a sickle, he was sure that Devidas would die in a single blow considering his old age and frail health. Ashok, therefore, chose to strike at the neck of Devidas in the backdrop of his threat that he would kill

Devidas. A single blow on the neck, a vital part, of an old man, with a deadly weapon, was knowingly inflicted by Ashok, so as to kill him. He, therefore, submits that this Court should not show any sympathy towards Ashok.

WHETHER DEATH OF DEVIDAS IS HOMICIDAL?

9 We have perused the postmortem report Exhibit 44 which indicates the following injuries at Sr.No.17 :-

*"Injury site : 0.5 cm Anterior to Lt clavicle.
Injury due to object with sharp cutting edge.
Shape :- Spindle shaped clean cut and everted.
Margins :- Everted width : 2.5 cm.
Length : 5 cm (2 inch) (5 cm)
Depth : About 3 1/2 inch (10 cm).
Curvature with gaping wound.
Lt carotid artery clean cut with profuse haemorrhage.
No bruising but greenish skin discoloration of Lt shoulder Jt."*

10 At Sr.No.20 in the postmortem report, the injuries to the thorax indicate that the left side first and second rib cartilage was torn. The probable cause of death in the opinion of the Medical Officer was "Cardio respiratory arrest due to haemorrhagic shock due to incised wound".

11 It is not the contention of the appellant or the witnesses or the investigating machinery that Devidas had suffered death on account of any cause other than the one mentioned in the postmortem report. His death, therefore, is proved to be homicidal. Devidas was killed on account of the

blow on his neck.

WHO COMMITTED THE MURDER?

12 The accused had exercised his right to silence before the Trial Court. After the witnesses testified in the case, he has recorded his statement under Section 313 of the Cr.P.C.. He has consistently denied his involvement. His most common answer in his statement was “it is false”. Out of the 39 questions, he has answered in the affirmative to question No.1, to indicate that he has heard and understood the prosecution evidence. From question No.2 to question No.36 (there are two question No.36) his answer was “it is false”. When called upon to examine himself or examine defence witnesses, he expressed his refusal. To the last question No.39, he has said that “*a false case has been filed against him*”.

13 When the police were informed of the incident and the investigating machinery was set into motion, a spot panchanama was carried out. A map was drawn, which is before us. We have perused the map Exhibit 56 which indicates the place of the Bitter Gourd creeper. It is between the two plots, one owned by Devidas on the south side and the other by Kesharbai on the north side. The murder of Devidas is said to have been committed in the lane (Galli) in front of the *Otta*. While investigating at the scene of crime, the police found the murder weapon flung in the goat shed owned by Kesharbai.

14 PW-1, brother of the wife of the deceased Devidas, has testified that a quarrel began at about 08.00 a.m. between the two families as Devidas had uprooted the Bitter Gourd creeper planted by Kesharbai. Bhikan had resolved the dispute and had pacified the quarreling parties. After sanity was restored, the members of the two families dispersed. The appellant Ashok was not around when this quarrel took place.

15 At about 12.00 noon, Ashok came at the door step of the house of Devidas and began questioning him as to why he had abused his mother and wife. He threatened Devidas by saying "बाहेर ये, तुझा मुडदा पाडतो". Devidas came out of his house and both quarreled with each other. PW-9, grand child of Devidas, came out of the house and started watching Devidas and Ashok getting physical with each other. According to Bhikan, Ashok then went to his house, brought a sickle and gave a heavy blow on the neck of Devidas. Bhikan claims to be standing at the *Otta* as he had come out of the house after Ashok started abusing Devidas. Seeing Ashok striking Devidas, Bhikan got down from the *Otta*. Ashok threw the sickle in his tin goat shed and ran away. Bhikan then went inside the house, brought a cloth and wrapped the injury to stop the flow of blood. By that time, villagers came near the spot. Bhikan went to the S.T. Bus Stand to fetch an auto rickshaw. As it was unavailable, he returned back. The

family members lifted Devidas to take him inside the house. They believe that Devidas died in a matter of two to three minutes after suffering the injury.

16 In his cross examination, he (PW-1) had stated that his grandchild also came out of the house. The wife of Devidas and family members took him inside and he died within two to three minutes. He denied that Devidas had fallen on one of the agricultural implements kept in the open portion which caused a neck injury to him. He had heard the shout of Ashok when he was sitting on a bed in the last room. He denied that he had not heard the voice of the accused. He stated that he could not intervene in the quarrel because Ashok had run away after inflicting the wound before Bhikan could intervene. The learned advocate for the appellant has strenuously canvassed that PW1 was not an eye witness as he had walk a few steps to come out of the house. We do not find anything worthy in his cross examination, which would have an impact on the case in hand. Little bit of omissions found in his cross examination would not demolish the testimony of Bhikan.

17 Bhimrao Baliram Patil, PW-6, stated in his deposition that in between 12 to 12.30 p.m. on the fateful day, he was going towards his field and he noticed a quarrel between Ashok and Devidas. Ashok was holding a sickle in his hand and assaulted Devidas with the sickle on his neck. Devidas collapsed to the ground. Ashok threw the sickle there and

ran away. Devidas died then and there itself.

18 In his cross examination, PW6 stated that the deceased was his uncle. He denied of any land transaction between Ashok and Kesharbai and that Kesharbai had refused to sell her land in favour of PW6. He denied that Ashok had not assaulted Devidas, had not thrown the sickle and had not run away. He stated that the accused ran away by the time PW6 had reached Devidas. The appellant contends that PW6 is a manufactured witness.

19 PW-9 was about 12 years of age when she deposed before the Court. To certain questions put to her, she stated that she was taking education in the six standard in Pandit Nehru Madhyamik Vidyalaya. She narrated the various subjects which were a part of her syllabus. While testing the witness for her competency in deposing before the Court, she was asked as to what does she know about “truth”. She answered by saying that “if one speaks lies, God would punish”. After the trial Court was satisfied that the witness could give rational answers and knew the sanctity of an oath in the name of god, she was administered the oath.

20 The relevant portion of her deposition is that Devidas has passed away on 16.09.2012. She, her brother and PW1 were present in the house. Her grandmother, aunt, mother and paternal aunt were away in their land (agricultural). She was comforting her grandfather by massaging his legs when she heard the accused shout in front of the house

and had uttered the words "निघ भाडखारु तुझा मुडदा पाडतो" and her grandfather responded by saying "तू माझ्या डोक्याला ताण का देतो?" and came out. Both became physical with each other and the accused struck Devidas with a sickle on his neck. Blood started oozing. He died on the foot steps of the house and was taken inside the house. She identified the sickle Article-A.

21 In her lengthy cross examination, PW-9 stated that the police had recorded her statement on the day of the incident. She could not assign any reason as to why the presence of PW-1 was not mentioned in her statement under Section 161. She could not assign any reason as to why it was not recorded in her statement that the accused had used foul language and had threatened to kill Devidas. She then stated that even from the middle room of the house, one could notice a visitor. She stated that in villages sickles are available in every house. We find that the grandchild had withstood a lengthy cross examination and had maintained her story.

22 The Investigating Officer, PW-14, was subjected to a short cross examination of a single paragraph. Non specific questions had been put to him. In connection of PW-3 Jitendra, the Investigating Officer stated that PW-3 never stated before him that he had not seen blood on the hand of the deceased. PW-3 did not state before the I.O. that he had

not noticed the injury on the left side of the neck of the deceased.

23 When we compared the cross examination of PW-9, wherein certain omissions were sought to be highlighted as noted above, with the cross examination of the I.O., to whom PW-3 had made certain statements which were allegedly not written down under Section 161, no questions were posed to the I.O. as to whether he could assign any reason to justify the above stated omissions. He was not confronted on the said statements.

(Dictated in open court on 08.10.2020 at 03.00 pm)

24 In the light of the testimony of PW-1, PW-6 and PW-9, what is established is that the deceased and Ashok came face to face in front of the Otta. PW-1 had not seen Ashok holding a sickle in his hand when the latter intimidated the deceased Devidas. It is also established that Devidas reacted to the threat of Ashok and stepped out of his house with the intention of physically engaging Ashok. PW-9 was watching Devidas as well as Ashok getting physical with each other and in her words uttered before the Court, both started wrestling with each other. As such, what has been established is that Devidas, despite his age of 70 years, decided to confront Ashok and both started a physical fight. In the English version of the deposition of PW-9, the Trial Court has recorded as “*the accused casted sickle on the neck of my grandfather.....*”. In the Marathi version, PW-

9 has said that "माझे आजोबा म्हणाले कि तू माझ्या डोक्याला का ताण देतो. त्यावेळेस आजोबा ओट्यावर होते. त्यानंतर आरोपी व माझ्या आजोबा मध्ये कुस्ती झाली. कुस्ती म्हणजे भांडण झाले. आरोपीने विळा माझ्या आजोबांच्या मानेवर टाकून पळून गेला". We are of the considered view that the meaning of the reproduced Marathi sentences would mean that the accused hit a sickle towards the neck of Devidas and he ran away. "मानेवर टाकून" in the local language would mean "hit on the neck".

25 PW-3, who claims to be a person before whom the accused has given an extra-judicial confession, has deposed (English version) by saying that while he was going towards village Fapore from Amalner by motorcycle, the accused signaled him with his hand and told him that he has committed murder of Devidas by means of a sickle and that PW-3 should hand him over to the police as the people in the village will beat him. His shirt was blood stained and blood was on his hand. PW-3 has then stated that the sleeves of his shirt were also having blood stains and that he could not hand over the accused in the custody of the police. In the Marathi version of the deposition of PW-3, he has stated that Ashok has told him that he had hit Devidas with a sickle. We, therefore, find that the accused never told PW-3 that he had murdered Devidas with a sickle, as, such a statement in Marathi would have been like "मी देविदास देवराम पाटील यांचा विळ्याने मारून खून केला". The actual Marathi version is "विळ्याने

मारले".

26 PW-6 (Bhimrao Baliram Patil) has stated that Ashok was holding a sickle in his hand and he assaulted Devidas. Ashok then threw the sickle and ran away. The learned advocate for the appellant, therefore, submits that there is a possibility that Ashok picked up the sickle from the courtyard of Devidas as nobody actually saw him return to his home to bring his own sickle. PW-1 who admittedly was sitting in the last room of the house, which was the other end of the house, obviously could not see from the narrow passage through the door to the second room and then the door to the first room and then through the door of the first room in front of the otta. If the version of PW-1 is believed, that he came out of the house after the deceased and Ashok resorted to a physical fight, the grandchild of the deceased (PW-9), who, as per the version of PW-1, was present on the otta, would have corroborated the version of PW-1 that the appellant had returned to his home to fetch a sickle and had returned to the house of Devidas to hit him. We, therefore, find that the version of PW-1 that the appellant had returned to his home to fetch a sickle, may not be believable.

27 The statement of PW-9 appears credible as she was with Devidas all along. PW-9 had stated in cross-examination that the house of Devidas consisted of three rooms and from the middle room, the courtyard was visible. She has then stated that in villages, sickles are available with

everyone. However, PW-9 has not stated in her testimony that the accused had returned to his home to fetch a sickle. Similarly, PW-6, who is the nephew of the deceased Devidas, admitted that his house is at a long distance from the house of Devidas and before he could reach the spot of the crime, the accused had run away. He, therefore, could not intercept the accused before Devidas suffered a stroke of the sickle. As such, even the version of PW-6 would not confirm as to whether, Ashok had returned to his home to fetch his sickle. It appears to us that Ashok was carrying a sickle.

28 Taking into account the above testimonies of witnesses, we are of the view that the prosecution has established that the accused had held the sickle in his hand which he hit on the neck of the deceased and eventually caused his death. We do not believe that Ashok had fetched it from his residence midway through the quarrel or had picked it up from the courtyard of the deceased.

WHETHER SECTION 304 IS ATTRACTED?

29 The learned advocate for the appellant has then contended that, if this Court arrives at a conclusion that the accused is guilty of hitting the sickle on the neck of the deceased, which has caused his death, the accused did not have any design or motive or intention of causing the death of Devidas. It was not a premeditated attempt. He did not intend to

take away the life of the deceased. He had not struck the deceased by firmly holding the sickle in his hand and had not inflicted a vicious blow on the neck of the deceased. He did not have the determination to inflict such a wound that was likely to kill Devidas and he did not have the intention of causing the death of Devidas.

30 Sections 299, 300, 301, 302 and 304 of the Indian Penal Code, read as under :-

"299. *Culpable homicide.*—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other,

shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

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—*

2ndly.—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—

3rdly.—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—

4thly.—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.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound

state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

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 defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence 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 defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

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'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.

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.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

301. *Culpable homicide by causing death of person other than person whose death was intended.—If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.*

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

"304. *Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with [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."

31 We have relied upon Ratanlal & Dhirajlal's 34th Edition commentary on the Indian Penal Code by Justice K.T.Thomas (former Judge, Supreme Court of India) and M.A.Rashid (Advocate, High Court of Kerala). While analyzing the distinction between culpable homicide and murder in the 34th edition, reference to cases of **Govinda (1876) 1 Bombay 342** and **State of Andhra Pradesh vs. Punneyya, AIR 1977 SC 45**, is made and it was commented, at pages 504, 505 and 506, as under:-

"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 section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable

under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the Second Part of Section 304.

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 minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be, keep in focus the key words used in the various clauses of sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
<i>A person commits culpable homicide if the act by which the death is caused is done:-</i>	<i>Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done:-</i>
<i>INTENTION</i>	
<i>(a) with the intention of causing death; or</i>	<i>(1) with the intention of causing death; or</i>
<i>(b) with the intention of causing such bodily injury as is likely to cause death; or</i>	<i>(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</i>
	<i>(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</i>
<i>KNOWLEDGE</i>	

(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse or incurring the risk of causing death or such injury as is mentioned above.
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Clause (b) of Section 200 corresponds with cls. (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 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 clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

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 the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury... sufficient in the ordinary course of nature to cause death" mean that death will be the most probable result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (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.

Clause (c) of section 299 and clause (4) of section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of section 300 would be applicable where the knowledge of the offender as to the probability of death of a person 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."

32 In the facts of the case in hand, the appellant/ accused had returned from the field and was enraged upon learning that his mother and his wife had been abused by Devidas and the bitter gourd creeper was uprooted by Devidas. The accused approached Devidas in rage. It is contended that he, however, did not have the intention of murdering

Devidas. Upon his intimidation, Devidas had stepped out of the house and had begun physical grappling with the accused. The accused struck the sickle towards Devidas which hit him on the neck. It cut his carotid artery and blood started oozing from the wound. This may have frightened the accused. While running away, he threw the sickle in his goat shed abutting his residence. We are of the view that the accused had the intention of causing bodily injury to the deceased and considering the weapon used and the age of the deceased, he was aware that such bodily injury was likely to cause the death of Devidas, if struck on his vital part.

33 In *Virsa Singh (supra)*, the Honourable Supreme Court has analyzed the effect of causing a grave injury and whether, such an injury would fall under any clause below Section 300. It was observed in paragraphs 12, 13 and 16 as under :-

"12. To put it shortly, 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 bodily 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 is 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."

"13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

"16. The learned counsel for the appellant referred us to Emperor v. Sardarkhan Jaridkhan, ILR 41 Bom 27 at p.29 : (AIR 1916 Bom 191 at p.192) (B) where Beaman J., says that :

"where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended."

With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course,

the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.- But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question."
(Emphasis supplied)

34 In **Suraj Bhan (supra)**, the Honourable Supreme Court dealt with the effect of a single blow injury and observed in paragraph 9 as under :-

- "9. *Learned counsel then argued that since the appellant has dealt only a single blow, the offence if at all, cannot be the one falling u/s. 302, IPC or at the most, it would come u/s. 304, Part II, IPC since there is absolutely no material to show that the appellant had any knowledge that he would be causing an imminent death of the deceased. In this regard we have examined the medical evidence and the manner in which the assault in question has taken place. The doctor has opined that the injury was caused in such a manner as to cause the death of the deceased which on dissection found by the doctor, had caused a fracture of the left parietal bone causing extra dural haemotoma. The doctor has opined that the death was due to shock and haemorrhage and as a result of the head injury which was sufficient to cause death in the ordinary course of nature. We are of the opinion that the appellant must be*

attributed with the knowledge that when he used a lathi forcefully on the head of a person, he was likely to cause death of the said person, the prosecution has also proved that this appellant had the intention to kill the deceased, therefore, we have no hesitation in rejecting the argument of learned counsel on this count also."
(Emphasis supplied)

35 In view of the above, though it may appear that the death of Devidas was not a premeditated murder, the accused had approached Devidas with a challenge to come out of his house so that he could cause his death by stating "तुझा मुडदा पाडतो". He had used a deadly weapon to inflict a blow on a vital part like the neck and the blow was of such magnitude that the deceased practically died within two to three minutes on the otta in his courtyard, which is the spot of incident. He was also aware that the deceased was an aged person of more than 70 years. We are, therefore, unable to accept the contention of the learned advocate for the appellant that the instant case would amount to culpable homicide not amounting to murder, so as to reduce the punishment by invoking Section 304, part I or part II of the Indian Penal Code.

36 As has been held in ***Kikar Singh vs. State of Rajasthan***, AIR 1993 SC 2426 and in ***Kulesh Mondal vs. State of West Bengal***, AIR 2007 SC 3228, all the four conditions namely, (i) act must be committed without premeditation in a sudden fight in the heat of passion, (ii) when there was a sudden quarrel, (iii) without the offender taking undue

advantage and (iv) the accused had not acted in a cruel or unusual manner, will have to be fulfilled so as to attract exception 4 to Section 300 of the Indian Penal Code. We do not find in the instant case that there was a sudden fight or a sudden quarrel. The accused had approached the deceased by shouting "तुझा मुडदा पाडतो" and had used a deadly weapon to inflict a single fatal blow on the neck (vital part) of an old and aged person.

37 As such, this Criminal Appeal is dismissed.

kps

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)